IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 7, 2008 Session

WILMA WILSON, ET AL. v. HARRY OURS, ET AL.

Appeal from the Circuit Court for Wilson County
No. 12492 John D. Wootten, Jr., Judge

No. M2006-02703-COA-R3-CV - Filed September 3, 2008

This action arises from the owner of a cemetery mistakenly selling burial lots to members of the plaintiffs' family that belonged to others, the resulting burial of two members of the plaintiffs' family in plots that belonged to others, and the resulting disinterment and re-interment of one of the two decedents. The plaintiffs, six surviving family members of the two decedents, filed this action against the owner of the cemetery, the City of Lebanon, and several of its employees in which they asserted claims for trespass, negligence, nuisance, and outrageous conduct. Prior to trial, the trial court dismissed all but two claims. The only claims that went to trial were a claim for general negligence and a claim for nuisance. Following a bench trial, the trial court dismissed the nuisance claims of all plaintiffs and dismissed the claims by three of the six plaintiffs for negligence. The trial court awarded three of the plaintiffs damages totaling $45,000 for the negligent burial of the decedents. The plaintiffs and the City of Lebanon appeal. We have determined that the trial court did not err by dismissing the plaintiffs' claims for nuisance. As for the plaintiffs' claims of negligence, we have determined that the trial court erred by awarding any of the plaintiffs damages. This is because the plaintiffs' claims for infliction of emotional distress were dismissed prior to trial, and the dismissal of those claims was not appealed. Further, the plaintiffs presented no proof of physical or personal injuries associated with the emotional damages alleged and they presented no proof of property damage. The only proof of damages presented by the plaintiffs pertained to emotional suffering related to the news that their loved ones would be disinterred and re-interred. Accordingly, we reverse the trial court's award of damages to three of the plaintiffs. We affirm the trial court in all other respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed in Part; Affirmed in Part

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which RICHARD H. DINKINS, J., joined. PATRICIA J. COTTRELL, P.J., M.S., not participating.

Mary Byrd Ferrara and J. Russell Farrar, Lebanon, Tennessee, for the appellant, City of Lebanon.

Michael R. Jennings, Lebanon, Tennessee, for the appellees, Wilma Wilson, Dianne Martin, John B. Wilson, Jr., individually and as natural parent of Joseph Lee Wilson, age 12, and Jacob Daniel

Wilson, age 10, Nancy J. Wilson, individually and as parent of Joseph Lee Wilson, age 12, and Jacob Daniel Wilson, age 10, Joseph Lee Wilson and Jacob Daniel Wilson.

OPINION

The claims at issue arise out of two separate purchases of cemetery plots by the plaintiffs or their relatives from Cedar Grove Cemetery, which is owned and operated by the City of Lebanon (the "City"). The admitted errors by the City were the direct cause of two decedents being buried in cemetery plots that were owned by others, which necessitated the disinterment and re-interment of one of the decedents.

Purchase of the Grave Sites and Discovery of the Problems

The cemetery plots at issue were purchased nine months apart. The first plots were purchased after John B. Wilson, Jr., and his wife, Nancy Wilson went to Cedar Grove Cemetery on November 6, 2000, to purchase a cemetery plot for their beloved son, James B. Wilson, who had died the previous day. Upon their arrival, the Wilsons met with Harry Ours, an employee of the "Street Department" who was unfamiliar with the role of selling cemetery plots.[1] However, because the employee responsible for selling such plots was on vacation, Harry Ours undertook that role himself. After speaking with Mr. Ours, John and Nancy Wilson purchased three grave sites, one for their deceased son, James, and two for themselves.[2] On November 7, 2000, the Wilsons buried their son in the cemetery plot that had been purchased for him.

Nine months later, John Wilson, Jr., returned to the Cedar Grove Cemetery with his sister, Dianne Martin, and their mother, Wilma Wilson, to assist in the purchase of two additional cemetery plots. Those plots were intended for Wilma Wilson and her husband, Bruff Wilson, who was terminally ill. As before, Mr. Ours greeted the family and assisted them with the arrangements. The Wilsons informed Mr. Ours that they desired to purchase two additional plots near James B. Wilson's grave site, and Mr. Ours directed the family to two nearby plots, which Mrs. Wilma Wilson purchased. Two days later, Bruff Wilson died. He was buried on August 24, 2001, in the plot his wife had purchased for him.

Three months later, Mrs. Wilma Wilson received a telephone call from Charles Brown, who worked for the City at Cedar Grove Cemetery. Mr. Brown informed Mrs. Wilma Wilson that the two plots she purchased for her husband and herself were, in fact, owned by the Gillihan family and therefore the City was going to disinter and re-inter her husband. Mrs. Wilma Wilson was "shocked and horrified that something like that could happen," became very emotional, and informed Mr. Brown that she thought she was having a heart attack.

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[1] He was principally responsible for mowing the cemetery grounds.

[2] James A. VandenHeusel, the father of Nancy Wilson, paid for his deceased grandson's grave site. The details surrounding the sale of the subsequent two graves to John and Nancy Wilson are in dispute; however, it does not affect the outcome of this case.

After receiving the phone call from Mr. Brown, Mrs. Wilma Wilson immediately called her daughter, Dianne Martin, to explain the situation. Thereafter, Dianne Martin called her brother, John Wilson, Jr., to discuss the situation. Following the phone call, John Wilson, Jr., left work immediately to be with his mother. Upon arrival, he found his mother crying and "just torn up." Subsequently, after visiting with his mother, John Wilson, Jr., went to the cemetery to gather his thoughts and "be close to his dad and his son."

On the day after Thanksgiving in 2001, John Wilson, Jr., went to the cemetery with his sister and mother to meet with Mr. Brown. It was during this meeting that John Wilson, Jr., asked Mr. Brown to determine if a similar mistake had been made with his son's grave.[3] In fact, a similar mistake had been made and Mr. Brown notified John Wilson, Jr., that his son would have to be moved.[4] John Wilson Jr. then notified the rest of the Wilson family of the fact that James Wilson and Bruff Wilson would both have to be disinterred and re-interred.

A year later, on November 15, 2002, Wilma Wilson, Dianne Wilson Martin, John B. Wilson, Jr., and Nancy Wilson,[5] (collectively, the "plaintiffs") filed this action against the City and several other defendants asserting claims for negligence, nuisance, and outrageous conduct.[6] Following numerous motions and the dismissal of a majority of the defendants and some of the claims asserted in the original complaint, the plaintiffs filed an Amended Complaint in April of 2005, in which they added employees of the City, namely Jeff Baines, Harry Ours, David Gibbs, and Charles Brown, as defendants in addition to the City.

After this action was commenced, Mrs. Wilma Wilson received a letter from Jeff Baines, the Commissioner of Public Works for the City. In the letter, Mr. Baines apologized for the City's mistake and offered to disinter and re-inter her husband in another cemetery plot at no expense to her. Mrs. Wilma Wilson did not accept the offer.

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[3] At trial, John Wilson, Jr., testified that he knew of the problems with his son's grave before his mother was contacted regarding the grave of Bruff Wilson. The conflicting and contradictory testimony makes it unclear as to when John Wilson, Jr., actually knew of the problems; however, it does not affect the outcome of this case.

[4] In preparation for the burial of James Wilson, Nave Funeral Home, rather than employees of the City of Lebanon, dug his grave.

[5] John B. Wilson, Jr., and Nancy Wilson also filed suit on behalf of their sons, Joseph Lee Wilson and Jacob Daniel Wilson, who were minors.

[6] The plaintiffs pled the tort of "outrageous conduct;" however, "[i]ntentional infliction of emotional stress and outrageous conduct are simply different names for the same cause of action." *Lyons v. Farmers Ins. Exch.*, 26 S.W.3d 888, 893 (Tenn. Ct. App. 2000).

In May of 2003, the City purchased from the Gillihan family the cemetery plots where Bruff Wilson was buried and titled the plots in the name of Mrs. Wilma Wilson.[7] As a consequence, the grave of Bruff Wilson, Mrs. Wilma Wilson's husband, was not disturbed and will not be disturbed.

As for the grave of James B. Wilson, the City offered to disinter and re-inter James B. Wilson at the City's expense and to place him in a family plot along with additional cemetery plots, enclosed by a border. At first, his parents John and Nancy Wilson declined the offer; however, they subsequently agreed. On December 27, 2004, at the City's expense and in compliance with all scheduling requests of the family, the City disinterred and re-interred James B. Wilson.[8]

The case went to trial in October of 2006; however, prior to trial, upon motion of the City, the trial court dismissed the trespass claims and all claims for outrageous conduct. Although a negligent infliction of emotional distress claim was not specifically pled, the trial court dismissed with prejudice any claims for infliction of emotional distress that may arise out of the general negligence claim.[9]

Thus, the only claims that went to trial were (1) a claim for general negligence and (2) a claim for nuisance. At the close of the plaintiffs' proof, the City and the individual defendants moved for dismissal. The trial court granted the individual defendants' motions to dismiss; however, the trial court denied the City's motion.

Subsequently, the City put on proof during its case-in-chief. At the conclusion of the trial, the trial court announced its findings and ruling from the bench. All claims of nuisance were dismissed upon the finding that the plaintiffs had failed to prove that a nuisance existed. As for the plaintiffs' negligence claims, the trial court determined that the City owed the plaintiffs a duty, that it breached its duty to the plaintiffs, and that the City's breach of its duty was both the cause-in-fact and legal cause of the plaintiffs' injuries. As for damages, the trial court found that plaintiffs Dianne Martin, Jacob Wilson, and Joseph Wilson suffered no damages and therefore their claims were dismissed. Mrs. Wilma Wilson, the widow of Bruff Wilson, was awarded damages of $22,500. The trial court based the award on Mrs. Wilma Wilson's testimony that she could not place a headstone on her husband's grave for a substantial time, and that she thought she was having a heart attack when she was informed by the City of its mistake. The trial court also awarded John and Nancy Wilson, the parents of James B. Wilson, the sum of $22,500 for their damages.

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[7] The City provided alternate burial plots for the Gillihan family.

[8] The City also provided John and Nancy Wilson with seven additional cemetery plots within a concrete border.

[9] The plaintiffs did not expressly assert a claim of negligent infliction of emotional distress. The plaintiffs asserted general claims of negligence, and a claim of negligent infliction of emotional distress is "essentially a claim of negligence which results in emotional distress." *Jones v. Marlow Family Ltd. P'ship*, No. E2006-02677-COA-R3-CV, 2007 WL 2142978, at *6 (Tenn. Ct. App. July 27, 2007).

The City and all of the plaintiffs filed appeals. The City contends the trial court erred in (1) awarding damages for stand alone negligent infliction of emotional distress absent severe emotional injury supported by an expert or medical proof, (2) excluding evidence of prior emotional/mental stressors where the sole damage claimed is emotional distress, (3) placing liability on the City when it retained immunity for these claims pursuant to the Governmental Tort Liability Act, (4) finding negligence on part of the City without a finding of negligence by a City employee, (5) finding negligence on part of the City where the City retains immunity for claims of negligent issuance of a permit or license, (6) awarding damages for the intentional tort of assault, where the plaintiffs failed to plead or prove a claim for assault, and (7) awarding damages to John Wilson when his claim was filed outside of the applicable statute of limitations.

The plaintiffs raise two issues: (1) whether the trial court erred in dismissing the negligence claims of Dianne Martin, Joseph Wilson, and Jacob Wilson, and (2) whether the trial court erred in dismissing the claims for nuisance.[10]

STANDARD OF REVIEW

In this non-jury case, our standard of review of the trial court's findings of fact is *de novo* and we presume that the findings of fact are correct unless the preponderance of the evidence is otherwise. *Tenn. R.App. P. 13(d)*; *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 296 (Tenn. Ct. App. 2001). The question as to the "amount of damages to be allowed presents an issue of fact upon which the judgment of the trial judge sitting without a jury is reviewed by this Court *de novo* upon the record with a presumption of correctness unless the evidence preponderates otherwise." *Armstrong v. Hickman County Highway Dep't*, 743 S.W.2d 189, 195 (Tenn. Ct. App. 1987). For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. *Walker v. Sidney Gilreath & Assocs.*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000); *The Realty Shop, Inc. v. R.R. Westminster Holding, Inc.*, 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999). Where the trial court does not make findings of fact, there is no presumption of correctness and we "must conduct our own independent review of the record to determine where the preponderance of the evidence lies." *Brooks v. Brooks*, 992 S.W.2d 403, 405 (Tenn. 1999). We also give great weight to a trial court's determinations as to witness credibility. *Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn.1997); *B & G Constr., Inc. v. Polk*, 37 S.W.3d 462, 465 (Tenn. Ct. App. 2000).

The weight, faith, and credit to be given to a witness' testimony lies with the trial judge in a non-jury case because the trial judge had an opportunity to observe the manner and demeanor of the witness during his or her testimony. *Roberts v. Roberts*, 827 S.W.2d 788, 795 (Tenn. Ct. App. 1991); *Weaver v. Nelms*, 750 S.W.2d 158, 160 (Tenn. Ct. App. 1987). In reviewing documentary proof such as deposition testimony that was presented to the trial court, "all impressions of weight

[10]The plaintiffs initially filed a notice of appeal with regard to the trial court's ruling as it relates to the individual defendants, but the plaintiffs voluntarily dismissed their appeal as to the individual defendants. Thus, the only issues before this Court are those between the City and the plaintiffs.

and credibility are drawn from the contents of the evidence, and not from the appearance of witnesses and oral testimony at trial." *Wells v. Tennessee Board of Regents*, 9 S.W.3d 779, 783-84 (Tenn. 1999) *rev'd on other grounds*, 231 S.W.3d 912 (Tenn. 2007). An appellate court "may make an independent assessment of the credibility of the documentary proof it reviews without affording deference to the trial court's findings." *Id*. at 783. When the proof is presented through a deposition, the appellate court can judge the credibility of the witness just as well as the trial court. *Id*. at 784. There is no presumption of correctness with respect to the trial court's conclusions of law. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999).

ANALYSIS

We have determined that two issues are dispositive of this appeal. One is whether the trial court erred in dismissing the plaintiffs' claims based on nuisance; the other is whether the trial court erred in awarding damages to the plaintiffs on their general negligence claim. We will discuss each in turn.

The Nuisance Claim

A nuisance is "a condition," as distinguished from an act or failure to act, as is the case in a negligence claim. *Cuffman v. City of Nashville*, 175 S.W.2d 331, 332 (Tenn. Ct. App. 1943) (quoting *Burnett v. Rudd*, 54 S.W.2d 718, 720 (Tenn. 1932) (holding the plaintiff failed to distinguish between "a condition produced by the affirmative action of the city and the negligent acts of its employees resulting in injury to a citizen")). In general, negligence is not involved in nuisance actions. *Id*.

In order for a Tennessee municipality to be held liable for nuisance, the plaintiff must establish the following requirements: (1) the existence of "an inherently dangerous condition" and (2) "affirmative action on the part of the municipality" that caused the condition. *Paduch v. City of Johnson City*, 896 S.W.2d 767, 771 (Tenn. 1995); *Rector v. City of Nashville*, 134 S.W.2d 892 (1939). Both of these elements must be established before a nuisance can be found. *Paduch*, 896 S.W.2d at 771; *Dean v. Bays Mountain Park Ass'n*, 551 S.W.2d 702, 704 (Tenn. Ct. App. 1977) (stating that both elements must be established before a nuisance can be found and "the distinction must be preserved 'between negligence, an omission of duty, and a nuisance, or active wrong'").

The City is a municipality, thus, the plaintiffs have the burden of proving, *inter alia*, that an inherently dangerous condition existed. The record before us is devoid of any proof the City created an inherently dangerous condition. Accordingly, the plaintiffs have failed to carry their burden of proof to establish a claim of nuisance, and, therefore, their claim of nuisance must be dismissed. *See Dean*, 551 S.W.2d at 704 (wherein this court dismissed the complaint on the ground that there was no evidence in the record to establish an inherently dangerous condition). Accordingly, we affirm the decision of the trial court to dismiss the plaintiffs' claims of nuisance.

The Award of Damages

The trial court awarded Mrs. Wilma Wilson damages of $22,500, and John and Nancy Wilson the sum of $22,500 for their damages. The City contends the trial court erred in awarding damages to the plaintiffs. In principal part, the City contends it was error to award the plaintiffs any damages because the plaintiffs failed to present evidence of injuries or damages other than "emotional" injuries, the emotional injuries were neither severe nor extreme, and there is no expert medical proof to support a claim for stand alone emotional injuries. The City also contends the dismissal of the plaintiffs' claims for negligent infliction of emotional distress[11] effectively bars any award of damages for "emotional injuries" without accompanying physical injuries.

We have determined it was error to award damages to any of the plaintiffs. There are three reasons for our decision. One, none of the plaintiffs sustained any physical injuries; thus, their claims of emotional injuries constitute stand alone claims for emotional injuries, meaning they occurred in the absence of accompanying physical injury or physical consequences. Two, the plaintiffs' stand alone claims for negligent infliction of emotional distress were properly dismissed. Three, the City's conduct did not constitute extreme or outrageous conduct, and thus, the plaintiffs failed to state a claim upon which relief could be granted for stand alone emotional injuries.

It is undisputed that none of the plaintiffs incurred any expenses or property damage as a consequence of the City's negligence. The plaintiffs were not charged for the disinterment and re-interment of James B. Wilson,[12] and Bruff Wilson was not and will not be disinterred.[13] Moreover, none of the plaintiffs received medical or psychological treatment as a consequence of the City's negligence.[14] The only evidence of "injuries" or "damages" sustained by the plaintiffs pertained to the emotional consequences of learning that a beloved relative would be disinterred and re-interred and the resulting delays in erecting grave markers.

But for a few exceptions, plaintiffs may not recover damages where the only "injury" resulting from the defendant's negligence is mental distress "without accompanying physical injury or physical consequences, or without other independent basis for tort liability." *Laxton v. Orkin*

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[11] On August 19, 2005, upon the City's Second Renewed Motion for Partial Summary Judgment, the trial court granted the City's Motion and stated that "all claims against the City of Lebanon for negligent infliction of emotional distress are dismissed, with prejudice."

[12] Any and all expenses regarding these matters were incurred by and paid by the City.

[13] Although it was first announced that Bruff Wilson would need to be disinterred and re-interred, the City was able to purchase his cemetery lot for the benefit of Mrs. Wilma Wilson.

[14] Some of the plaintiffs received psychological counseling, but that counseling was for the loss of a loved one, not because of the City's negligence in selling the family cemetery plots belonging to others.

Exterminating Co., Inc. 639 S.W.2d 431, 433-34 (Tenn. 1982)[15] (citing *Medlin v. Allied Investment Co.*, 217 Tenn. 469, 398 S.W.2d 270 (1966); *Bowers v. Colonial Stages Interstate Transit Co.*, 163 Tenn. 502, 43 S.W.2d 497 (1965); 64 A.L.R.2d 100, at 115). The denial of damages for emotional disturbance alone applies to all forms of emotional disturbance including temporary fright, nervous shock, nausea, grief, rage, and humiliation. *See* Restatement (Second) of Torts § 436(a) (1979). The fact that these "injuries" are accompanied by transitory, nonrecurring physical phenomena, harmless in themselves, such as dizziness, vomiting, and the like, does not make the actor liable where such phenomena alone are inconsequential and do not amount to any substantial bodily harm. *Id.,* § 436A comment (c) (1965).

The foregoing notwithstanding, Tennessee permits the recovery of damages for emotional injuries standing alone that result from another's extreme or outrageous conduct. *Moorhead v. J. C. Penney Co., Inc.*, 555 S.W.2d 713 (Tenn. 1977) (permitting recovery of damages for mental distress without accompanying physical injury where the mental anguish was due to the "extreme and outrageous" conduct of the defendant). However, but for a cause of action for negligent infliction of emotional distress, *Eskin v. Bartree*, ___ S.W.3d ___, 2008 WL 3504934 (Tenn. Aug 14, 2008); *Flax v. DaimlerChrysler Corp.*, ___ S.W.3d ___, No. M2005-01768-SC-R11-CV, 2008 WL 2831225, at *3 (Tenn. July 24, 2008); *Camper v. Minor*, 915 S.W.2d 437, 446 (Tenn. 1996), Tennessee does not permit a plaintiff to recover damages for emotional injuries without accompanying physical injury where the defendant's conduct merely constitutes general or simple negligence.[16]

The facts of this case are generally undisputed. In two separate transactions, the City negligently sold the plaintiffs cemetery plots that had been previously sold to others, the error of which was not discovered until after the plaintiffs' loved ones were buried. When the errors were discovered, the City notified the plaintiffs of the error and that their loved ones must be disinterred and re-interred. Mrs. Wilma Wilson, wife of Bruff Wilson, testified that when she received the telephone call that her husband's grave site would have to be relocated, she felt like she was having a heart attack. She stated, "I was shocked and I was just horrified that something like this could happen." Subsequent to receiving the telephone call, she cried a lot, had problems sleeping and

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[15] In *Laxton*, the plaintiffs ingested polluted water when Orkin Exterminating Company negligently caused carcinogenic chemicals to infiltrate the plaintiffs' household water supply. As a consequence the plaintiffs needed and obtained medical services after using the spring, and there was dispute as to the necessity or reasonableness of the medical expenses. The *Laxton* court ruled, "Even though the tests proved negative, in our opinion a jury could find sufficient "injury" to these plaintiffs to justify a recovery for their natural concern and anxiety for the welfare of themselves and of their infant children." *Laxton,* 639 S.W.2d at 433-34.

[16] Tennessee permits recovery of damages for emotional injuries resulting from the ingestion of deleterious food or beverages although physical injury was slight. In most such cases, recovery was permitted with a minimum showing of physical injury; "where this did occur full recovery has been allowed for the fright, shock, or other 'mental' aspect of the claim." *See Ford v. Roddy Mfg. Co.*, 448 S.W.2d 433 (Tenn. 1969) (insects in soft drink); *Boyd v. Coca Cola Bottling Works*, 177 S.W. 80 (Tenn. 1914) (cigar stub in soft drink); *Roddy Mfg. Co. v. Cox*, 7 Tenn. Ct. App. 147 (1927) (dead mouse in soft drink; plaintiff suffered nausea and saw doctor "who washed out his stomach and gave him some medicine"); *Jones v. Mercer Pie Co.*, 214 S.W.2d 46 (Tenn. 1948).

eating, and "couldn't do anything." Upon later learning that her husband would not have to be moved after all, Mrs. Wilma Wilson was relieved. Mrs. Wilma Wilson did not seek medical, psychiatric, or psychological assistance as the result of learning of the possibility that her husband might have to be moved. She also testified that she waited to place a headstone at her husband's grave until "after this [trial] is over." The trial court took this into account when awarding damages. Mrs. Wilma Wilson did not introduce any evidence of property damage, reduction in property value, or damages for any physical injury. The only damages about which she testified relate to the tombstone and her emotional well-being after the incident.

John Wilson, Jr., the father of James. B. Wilson, testified that upon learning that his son was going to have to be moved, he was "almost in a fog," very close to what he felt when his son died. Additionally, he testified that it was very stressful, and his wife testified that he was devastated. The situation made it difficult to sleep, eat and go to work.[17] Joseph Wilson, John Wilson's surviving son, testified that after the situation at the funeral home, his father's temper is a little quicker and that he is carrying a burden on his heart and mind. As was the case with Mrs. Wilma Wilson, John Wilson did not introduce evidence of any property damage or damages for any physical injury. The only damages about which he testified relate to the tombstone and his emotional well-being after the incident.

Nancy Wilson, mother of James B. Wilson, was attending grief counseling for the death of her son prior to learning her son would have to be disinterred. After learning of this consequence, she testified that "it was like [she] fell back two steps" in dealing with her grief. Regarding her employment, Nancy stated that the school administration transferred her from her job as a guidance counselor at school to a classroom teacher "because of the death of her son." There is no evidence in the record that this change was related to the need to disinter her son and there is no evidence that this caused any financial loss to her. Like the other plaintiffs, Nancy Wilson did not prove any property damage or damages for any physical injury. The only damages about which she testified related to the tombstone and her emotional well-being after the incident.

As the trial court correctly determined, the foregoing facts do not state a cause of action for negligent infliction of emotional distress. To maintain such an action, the plaintiff must establish the following essential elements:

> (1) the actual or apparent death or serious physical injury of another caused by the defendant's negligence, (2) the existence of a close and intimate personal relationship between the plaintiff and the deceased or injured person, (3) the plaintiff's observation of the actual or apparent death or serious physical injury at the scene of the accident before the scene has been materially altered, and (4) the resulting serious or severe emotional injury to the plaintiff caused by the observation of the death or injury.

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[17] John Wilson testified that he and his son Joseph sought counseling to deal with the death of James; however, he did not seek counseling regarding the disinterment and re-interment.

Eskin, ___ S.W.3d ___, No. W2006-01336-SC-R11-CV, 2008 WL 3504934, at *9 (Tenn. Aug. 14, 2008) (internal footnote omitted). In addition, the alleged serious or severe emotional injury suffered by the plaintiff must be established "through expert medical or scientific proof that he or she has suffered a 'severe' emotional injury."[18] *Flax v. DaimlerChrysler Corp*., ___ S.W.3d ___, No. M2005-01768-SC-R11-CV, 2008 WL 2831225, at *3 (Tenn. July 24, 2008) (citing *Camper v. Minor*, 915 S.W.2d 437, 446 (Tenn. 1996)).

The plaintiffs failed to state a cause of action for negligent infliction of emotional distress because the deaths of James B. Wilson and Bruff Wilson were not caused by the City's negligence. This fact alone defeats the plaintiffs' claims for negligent infliction of emotional distress. Moreover, there is no expert proof to establish that any of the plaintiffs suffered serious or severe emotional injury. Accordingly, the trial court correctly dismissed the plaintiffs' claims for negligent infliction of emotional distress. This is significant because the dismissal of a plaintiff's claim for negligent infliction of emotional distress constitutes a bar to that plaintiff's general negligence claims for emotional injuries in the absence of accompanying physical injury or physical consequences, or without other independent basis for tort liability. *See Jones v. Marlow Family Ltd. P'ship*, No. E2006-02677-COA-R3-CV 2007 WL 2142978, at *6 (Tenn. Ct. App. July 27, 2007) (stating, "the trial court's grant of summary judgment on the Plaintiffs' claims for negligent infliction of emotional distress was effectively a dismissal of any claims of ordinary negligence in which the Plaintiffs sought to recover only for injuries which were emotional or psychological in nature.").

The foregoing notwithstanding, the plaintiffs contend they presented viable claims and sufficient proof to recover damages because the matters at issue pertain to the burial of a loved one and the City's conduct constitutes outrageous or extreme conduct. We respectfully disagree.

The unfortunate emotional injuries experienced by the Wilson family are similar to those at issue in *Wood v. Woodhaven Memory Gardens, Inc*., 1991 WL 112273, wherein the plaintiffs brought an action against Woodhaven Memory Gardens after it refused to allow the parents to place a full ledger memorial on their son's grave. To briefly summarize the relevant facts, the plaintiffs purchased the plot and casket and selected the funeral services from Woodhaven following their son's untimely death. They did not immediately select a memorial for the grave because they planned to make that selection at a later date. Their son was buried on February 3, 1987. A week later, Mrs. Wood paid her first visit to Woodhaven to select a memorial for her son's grave. Mrs. Wood testified that she spoke with Mr. Jarvis, an employee of Woodhaven, who showed her a book of various types of memorials including "full ledger memorials" and told her that anything she wanted to pick out of the book was available at Woodhaven. On her next visit, Mrs. Wood spoke with Ms. Hilton, a cemetery employee, and told Ms. Hilton she wanted a full ledger memorial for her son's grave and claims that Ms. Hilton told her a full ledger memorial was available. Following

[18] The Supreme Court went on to explain in *Flax* that *Camper* "balances the goals of compensating victims and avoiding fraudulent claims by: 1) allowing a person with emotional injuries to bring [negligent infliction of emotional distress] claims regardless of whether he or she has suffered any physical injury, and 2) requiring a higher degree of proof for emotional injuries under these circumstances." *Flax*, ___ S.W.3d ___, 2008 WL 2831225, at *3.

a subsequent visit by Mrs. Wood to Woodhaven it became apparent that there was a problem because Woodhaven did not permit full ledgers for the type of grave their son was buried in. After the president of Woodhaven explained it was against the cemetery's rules and regulations and he would not allow the Woods to place a full ledger over their son's grave, the Woods filed a action to recover damages for their emotional injuries. It was admitted that they had not sustained physical damages.

Following a bench trial, the trial court awarded a monetary judgment to Mr. and Mrs. Wood. Woodhaven appealed, after which this court rendered an opinion wherein the following conclusion was set forth:

> The only damages claimed by the Woods in their complaint are for emotional distress. Admittedly, the burial of a relative is a highly emotional issue. However, in Tennessee where recovery is sought solely on the grounds of mental or emotional disturbance, the conduct complained of must have been outrageous and serious mental injury must have resulted. *Medlin v. Allied Investment Co.*, 217 Tenn. 469, 479, 398 S.W.2d 270, 274 (Tenn. 1966). We agree with the trial court's initial finding that "the defendant has done nothing that would even closely measure up to the tort of outrageous conduct." We find that the Woods have put forth no evidence of actual damages and they have not shown that Woodhaven's conduct was outrageous and caused serious mental injury. The Woods have failed to prove their damages and without proof of damages there can be no recovery. *Inman v. Union Planters National Bank*, 634 S.W.2d 270, 272 (Tenn. Ct. App. 1982).

Wood, 1991 WL 112273, at *5.

We acknowledge, as did the court in *Wood*, that the burial of a beloved relative is a highly emotional issue as is the disinterment and re-interment of that loved one. Nevertheless, the errors and omissions of the City do not constitute extreme or outrageous conduct and, as was the case in *Wood*, the plaintiffs may not recovery damages for emotional distress arising from the defendant's mere negligence. *Id.* at *5; *Medlin*, 398 S.W.2d at 274. Accordingly, we must vacate the award of damages in this case.

We, therefore, vacate the monetary judgments awarded in favor of Wilma Wilson, John Wilson and Nancy Wilson.[19]

[19] The plaintiffs also claim the trial court erred in dismissing the claims of negligence of (1) Dianne Martin, who is the daughter of Bruff Wilson and the aunt of James Wilson, and (2) Joseph Wilson and Jacob Wilson, who are the surviving brothers of James Wilson. Our ruling renders this issue moot.

IN CONCLUSION

The judgment of the trial court is affirmed in part and reversed in part, the monetary judgments awarded the plaintiffs are vacated, and this matter is remanded with costs of appeal assessed against the plaintiffs, jointly and severally, and their surety.

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FRANK G. CLEMENT, JR., JUDGE